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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DONNA M. MARTINEZ, Defendant and Appellant.	H033830 (Santa Clara County Super. Ct. No. CC768277)

Donna M. Martinez pleaded no contest to two misdemeanors: violation of Penal Code section 76, subdivision (a)(1)[1] (threatening public official) (count one) and violation of section 422 (making criminal threats) (count two). The trial court placed her on three years of court probation and ordered her to pay $1,000 to a victim, a mandatory restitution fund fine of $100 and other fees. One of the conditions of probation imposed upon defendant was that "she take all prescribed medicine if directed to take it by a physician . . . ." On appeal, defendant contends this probation condition is unconstitutionally vague and overbroad.

We agree that probation condition is unconstitutionally overbroad and limit its application to medication prescribed for mental disorders.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

A. *Procedural Background*

An information, filed on November 15, 2007, charged defendant with committing a felony violation of section 76, subdivision (a)(1), by threatening Judge Lawrence Newman on or about May 24, 2007 (count one) and a misdemeanor violation of section 422 by making criminal threats against Esther Pangelina on or about May 17 or 18, 2006 (count two). The probation report indicates these offenses arose from the judge's denial of her workers' compensation claim.

On November 19, 2007, doubt as to defendant's mental competence was declared pursuant to section 1368 and criminal proceedings were suspended. On March 12, 2008, the court issued an order of commitment for defendant's care and treatment pursuant to section 1370, subdivision (a)(2), and directed that she be transported with an order permitting the facility to administer antipsychotic medication *if she consented*. On June 25, 2008, the court determined that defendant's competence had been restored and the criminal proceedings were reinstated.

On November 18, 2008, the trial court reduced count one to a misdemeanor violation, but reserved the right to change it back to a felony if defendant violated probation conditions. Defendant then pleaded no contest to both counts.

The probation report recommended that the court grant "court probation" and order that defendant "enter and complete a psychological treatment program as directed by the Court" and "take all prescribed medication as directed by physician." The probation report indicated there were no prior convictions. It noted that the probation officer was "in agreement with the negotiated plea."

On January 29, 2009, after noting that this was a conditional plea based upon a grant of court probation, the court placed defendant on "three years summary or court probation." It declined to adopt the recommended probation condition requiring

defendant to undergo psychological treatment but did adopt a probation condition requiring defendant to take all prescribed medication if so directed by a physician.

B. *Vagueness*

Defendant first argues that the medication condition is unconstitutionally vague. She recognizes that the "plain language of the order" requires her to take all prescribed medicine if directed to take it by a physician, not only medication prescribed by a psychiatrist for her mental health. She complains that the court's order, if read literally, would require her to "take an antibiotic prescribed by a general practitioner for an infection, even if she suffers an adverse reaction." She asserts that the condition is unconstitutionally vague because "a person could not objectively determine whether to follow the literal language of the order or the spirit of the order . . . ."

"A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness. (*People v. Reinertson* (1986) 178 Cal.App.3d at pp. 324-325 . . . .)" (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) "[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' (*People v. Castenada* (2000) 23 Cal.4th 743, 751 . . . .) The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' (*ibid.*), protections that are 'embodied in the due process clauses of the federal and California Constitutions. (U.S. Const., Amends. V, XIV; Cal. Const., art. I, § 7).' (*Ibid.*)" (*Ibid*.)

The vagueness doctrine " ' "bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " [Citations.]' (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115 . . . (*Acuna*).) A vague law 'not only fails to provide adequate notice to those who must observe its strictures, but also

"impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [Citation.]' (*Id.* at p. 1116 . . . .) In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that 'abstract legal commands must be applied in a specific *context*,' and that, although not admitting of 'mathematical certainty,' the language used must have ' "*reasonable* specificity." ' (*Id.* at pp. 1116-1117 . . . , italics in original.)" (*Sheena K., supra*, 40 Cal.4th at p. 890.)

Generally, words should be understood to have their ordinary and commonly understood meaning. (See Civ. Code, § 13; see also Code Civ. Proc., § 16.) Here, the words of this probation condition are readily understandable and their ordinary meaning provide sufficient certainty to satisfy due process notice requirements. Under the condition, defendant is plainly required to take all prescribed medicine if so directed by a treating physician. Presumably, if she has an adverse reaction to a particular medication, the physician will determine whether she should continue taking the medication or discontinue its use and instruct her accordingly.

Some of defendant's arguments raised with respect to the issue of vagueness are really contentions that the medication condition is not reasonable (see § 1203.1 ["court may impose and require . . . reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer"]; *People v. Lent* (1975) 15 Cal.3d 481, 486 ["a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality"]; see also *People v. Olguin* (2008) 45 Cal.4th 375, 379 ["a condition of probation must serve a purpose

specified in Penal Code section 1203.1"]) or the condition is unconstitutionally overbroad. The reasonableness issue was not preserved for review on appeal (see *People v. Welch* (1993) 5 Cal.4th 228, 237 [rule of forfeiture applies where defendant fails to timely challenge a probation condition on *Lent* grounds]; see also *In re Sheena K.*, *supra*, 40 Cal.4th at p. 882). We next consider defendant's overbreadth challenges.

C. *Overbreadth*

1. *Arguments*

"A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad. [Citation.]" (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.) Defendant argues that the prescription medication condition must be stricken because it is unconstitutionally overbroad. She contends that it is overbroad because it is "not limited to psychiatric medication or mental illness" and instead "applies to *all* medication prescribed by *any* physician, not merely a mental health professional." She also maintains that, as a competent adult, she is constitutionally entitled to refuse medical treatment or medication. She argues that involuntary medication requires a compelling state interest but here there was no "proper inquiry of necessity."[2] Defendant insists that a court cannot force a competent probationer to take medication involuntarily under threat of incarceration, citing *U.S. v. Williams* (9th Cir. 2004) 356 F.3d 1045. She

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[2] Defendant is not arguing that the medication condition is invalid as a matter of law because it could not, under any circumstance, be lawfully imposed (see *People v. Scott* (1994) 9 Cal.4th 331, 354 ["a sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case"). "[A]n unconstitutionally vague or overbroad probation condition does not come within the 'narrow exception' to the forfeiture rule made for a so-called unauthorized sentence or a sentence entered in excess of jurisdiction. [Citations.]" (*In re Sheena K.*, *supra*, 40 Cal.4th 875, 886-887.)

argues that the recent case of *In re Luis F.* (2009) 177 Cal.App.4th 176 supports her position.

Respondent asserts that defendant's constitutional claims are not cognizable on appeal and were forfeited by defendant's failure to raise them below because they do not present pure questions of law, citing *In re Sheena K.*, *supra*, 40 Cal.4th 875. Respondent argues that, even if defendant's constitutional claims are reviewable on appeal, the probation condition is reasonably related to present and future criminality and is not constitutionally defective because, at the time the court granted probation, defendant had a serious mental illness, she remained a danger to others, and she needed medication for recovery. Respondent points to the reports of the psychological evaluators assessing defendant for competency to stand trial.

2. *Constitutional Interests at Stake*

Both the United States Supreme Court and the California Supreme Court have recognized that individuals have a protected constitutional interest in refusing unwanted medication. (See *Sell v. U.S.* (2003) 539 U.S. 166, 179 [123 S.Ct. 2174] [although a defendant has a liberty interest in rejecting medical treatment, the U.S. Constitution "permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests"]; *Washington v. Harper* (1990) 494 U.S. 210, 221-222 [110 S.Ct. 1028] [a mentally ill prisoner "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment"], 227 [but "the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the

inmate is dangerous to himself or others and the treatment is in the inmate's medical interest"]; *Cruzan by Cruzan v. Director, Missouri Dept. of Health* (1990) 497 U.S. 261, 278 [110 S.Ct. 2841] ["principle that a competent person has a constitutionally protected liberty interest[,under the due process clause of the Fourteenth Amendment to the U.S. Constitution,] in refusing unwanted medical treatment may be inferred from [U.S. Supreme Court's] prior decisions"], 279 [assuming U.S. Constitution provides a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition]; *In re Qawi* (2004) 32 Cal.4th 1, 14 [competent adult has the right to refuse medical treatment, even treatment necessary to sustain life, that is grounded in the state constitutional right to privacy and common law], 27 [but an MDO can be involuntarily treated with antipsychotic medication under nonemergency circumstances where the MDO is determined by a court to be incompetent to refuse medical treatment or where the MDO is determined by a court to be a danger to others within the meaning of Welfare and Institutions Code section 5300]; *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 531 [competent person's right to refuse treatment is grounded in common law and state constitutional law]; 532 [privacy clause in California's Constitution "protect[s] the fundamental interest in personal autonomy"].) For purposes of this appeal, we presume that defendant, as a competent adult, has a constitutionally protected interest in making personal and autonomous decisions regarding whether or not to take medication prescribed for her.

3. *Forfeiture*

In *In re Sheena K., supra*, 40 Cal.4th 875, the California Supreme Court established a limited exception to the forfeiture rule for challenges to probation conditions based upon facial constitutional defects. (*Id*. at pp. 887-889.) The court observed that a "facial challenge" to the "phrasing or language of a probation condition" "does not require scrutiny of individual facts and circumstances but instead requires the

review of abstract and generalized legal concepts-a task that is well suited to the role of an appellate court." (*Id*. at p. 885.) It reasoned: "An obvious legal error at sentencing that is 'correctable without referring to factual findings in the record or remanding for further findings' is not subject to forfeiture. [Citation.]" (*Id*. at p. 887.) After determining that some constitutional vagueness and overbreadth challenges to probation conditions could involve pure questions of law (*id*. at pp. 887-889), the court concluded that the particular challenge in that case "present[ed] an asserted error that is a pure question of law, easily remediable on appeal by modification of the condition. [Citations.]" (*Id*. at p. 888.)

But the court in *Sheena K., supra,* cautioned that its "conclusion [did] not apply in every case in which a probation condition is challenged on a constitutional ground" such as where the issue could not be resolved without reference to the sentencing record developed in the trial court. (40 Cal.4th at p. 889.) The court recognized that "a probation condition may not be patently unconstitutional but may suffer nonetheless from vagueness or overbreadth" (*id*. at p. 887) and that "in some instances, a constitutional defect may be correctable only by examining factual findings in the record or remanding to the trial court for further findings" (*ibid.*). In those instances where a constitutional challenge to probation conditions does not raise a pure question of law, the traditional objection and forfeiture rule applies. (*Id*. at p. 889.)

U.S. v. Williams, supra, 356 F.3d 1045, which involved supervised release under federal law, is not instructive with regard to application of California's forfeiture rule. The Ninth Circuit concluded that, even though supervised release conditions are reviewed deferentially under the abuse of discretion standard (*id*. at p. 1052), that a district court "must make on-the-record, medically-grounded findings that court-ordered medication is necessary to accomplish one or more of the [specified statutory] factors" and "must make an explicit finding on the record that the condition 'involves no greater deprivation of

liberty than is reasonably necessary[]' " as statutorily required "before a mandatory medication condition can be imposed at sentencing." (*Id.* at p. 1057.) The case did not involve application of California's forfeiture rule or California law.

In re Luis F., *supra*, 177 Cal.App.4th 176, did consider the forfeiture rule. In that case, it was argued that a probation condition requiring Luis to "continue taking prescribed medications, as directed" was unconstitutionally vague and overbroad and had to be stricken. (*Id.* at pp. 179-181.) The appellate court initially recognized that the forfeiture rule applied to Luis's claims: "Unlike the defect in *Sheena K.*, the alleged defects in the medication requirement here cannot be determined or potentially corrected based on abstract and generalized legal principles. . . . [T]he scope of the medication requirement, and its constitutionality, can be determined only in light of the facts and circumstances disclosed in the record regarding the medications that Luis had been taking prior to the court order. Under the holding of *Sheena K.*, Luis's objection would appear to have been forfeited, despite his labeling it in part a facial challenge." (*Id.* at p. 182.)

We conclude that to the extent that defendant's overbreadth arguments are actually species of the claim that the probation condition is not reasonably related to the current crimes or future criminality, she forfeited them by not raising them below. (*People v. Welch*, *supra*, 5 Cal.4th at p. 237.) Insofar as defendant's overbreadth arguments are not facial constitutional challenges, she forfeited them by not raising them below. (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 887, 889.)

4. *Limited Discretionary Review of Overbreadth Claim*

Despite the applicability of the forfeiture rule, we exercise our discretion to engage in a very limited review of defendant's overbreadth claim because of the importance of the constitutional interests at stake. Similar to the appellate court in *In re Luis F.*, which elected to reach the constitutional issues despite the lack of objection below because the probation condition potentially implicated important constitutional

rights (*In re Luis F.*, *supra*, 177 Cal.App.4th at pp. 183-184), we consider the merits of defendant's overbreadth claim to the extent it embraces medications prescribed for conditions other than mental health.

"In general, forfeiture of a claim not raised in the trial court by a party has not precluded review of the claim by an appellate court in the exercise of that court's discretion. [Citations.] Thus, an appellate court may review a forfeited claim-and '[w]hether or not it should do so is entrusted to its discretion.' [Citations.]" (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 887, fn. 7; see *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) We are aware that " 'discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. [Citations.]' [Citation.]" (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 888, fn. 7.)

The challenged probation condition appears to give any doctor who happens to treat defendant, for any physical ailment or condition, the unilateral right to dictate whether she takes prescribed medication. While this condition is certainly contrary to the doctrine of informed consent,[3] the question here is unconstitutional overbreadth. The reviewing court in *In re Luis F.* stated: "We agree with Luis that if the medication requirement were intended to subject him to future incarceration for failing to treat his toenail fungus as prescribed by a doctor, it would be impermissibly overbroad-not to

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[3] "While the physician has the professional and ethical responsibility to provide the medical evaluation upon which informed consent is predicated, the patient still retains the sole prerogative to make the subjective treatment decision based upon an understanding of the circumstances [under the common law doctrine of informed consent]. [Citations.]" (*Thor v. Superior Court* (1993) 5 Cal.4th 725, 735, see *id.* at pp. 732 ["under California law a competent, informed adult has a fundamental right of self-determination to refuse or demand the withdrawal of medical treatment of any form irrespective of the personal consequences"], 749 [this right of self-determination extends to quadriplegic prisoner who refused treatment necessary for survival]; *Cobbs v. Grant* (1972) 8 Cal.3d 229, 242 ["person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment" and "patient's consent to treatment, to be effective, must be an informed consent"].)

mention unreasonable and arbitrary." (177 Cal.App.4th at p. 184.) Defendant has made a similar argument with respect to prescription antibiotics. Respondent does not offer, and we cannot conceive of, any valid probationary purpose, under the circumstances of this case, for the probation condition insofar as it covers medications prescribed for general physical health. Accordingly, the probation condition must be deemed overbroad in that respect.

Here, the record reflects that defendant Martinez experienced serious mental health problems rendering her temporarily incompetent to stand trial and causing the proceedings in this case to be temporarily suspended. The psychological evaluations identified various mental disorders and one evaluator recommended psychotropic medication management. While the evaluations focused on defendant's competency, they imply that delusional thinking played some role in her crimes.

The subsequent certification of mental competence noted that there was no court order permitting involuntary psychotropic medications and defendant had consistently refused to take medication since her admission to the hospital. It also reflected that she had been diagnosed with a mental disorder and continued to "present with many of the delusional thoughts that were involved in her original finding of incompetency" but, nevertheless, she had been determined to have regained competence to stand trial. It reported that she remained a moderate danger to others.

The probation report stated that she had self-reported many physical ailments as well as psychological issues in her social data. It noted she was unemployed and receiving permanent disability benefits (SDI) but it did not state the nature of her disability. The probation report did not discuss whether defendant's mental health problems were a contributing or aggravating factor in the commission of the offenses or indicate that defendant was presently taking any prescription medications or being treated by any mental health professional but it nevertheless recommended probation conditions

requiring her to complete a psychological treatment program and take prescription medications.

As did the appellate court in *In re Luis F.*, we conclude that the probation condition at issue here is unconstitutionally overbroad to the extent the probation condition compels defendant to take medications prescribed for treatment of non-mental health problems that are entirely unrelated to the purposes of probation.[4] Unlike the court in *In re Luis F.*, however, we cannot modify the condition to limit it to medications prescribed for the particular mental disorders already being treated by medication because the record in this case does not reflect such circumstances.[5] But we can restrict the probation condition to medications prescribed for treatment of mental health problems to eliminate the overbreadth problem that is evident based upon the record before us.

Defendant further asserts that "even if limited to mental health medication, [the probation condition] is overbroad to meet a legitimate government interest in rehabilitation or public safety." In our view, defendant has not established that it is constitutionally impermissible to impose a probation condition compelling a probationer

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[4] Our conclusion disposes of defendant's hypothetical scenario of forced birth control, which she claims would be unconstitutional because she has a fundamental right to decide whether or not to become pregnant.

[5] In *In re Luis F.*, the appellate court ultimately determined that "the record as a whole, including that Luis was [orally] directed [by the juvenile court] to 'continue to follow the directions of [his] doctors and *counselors*,' clarifie[d] that the medication requirement was impliedly limited to medications prescribed for the conditions of depression and social anxiety disorder." (177 Cal.App.4th at p. 190.) In order to render it constitutional, the court "modif[ied] the condition of probation to require only that Luis 'continue taking medications prescribed for depression and social anxiety disorder, as directed by his doctors.' " (*Id.* at p. 192.) This modification was consistent with the probation reports that indicated Luis had been diagnosed with depression and social anxiety disorder two years prior to commission of attempted robbery, had been undergoing psychological counseling, and was taking two named medications for his mental disorders. (*Id.* at p. 180.)

to take medications[6] prescribed for a diagnosed mental disorder where the disorder was a contributing or aggravating factor in the commission of crime and where the disorder, if not treated by prescription medication, would significantly impact defendant's rehabilitation or ability to avoid future criminal activity. (Cf. *In re Luis F., supra,* 177 Cal.App.4th at p. 187 [refusing to adopt "a blanket requirement of 'necessity' for a medication condition of probation, explicit consideration of less restrictive alternatives, or 'on-the-record, medically-grounded findings' as a matter of federal constitutional imperative"].)

We decline to consider any further non-facial overbreadth claims because defendant failed to interpose any constitutional objections below, so the sentencing record below may not have been fully developed, and because additional factual inquiry and findings would be required to resolve whether and to what extent the probation condition, even as modified by this court, is still unconstitutionally overbroad under the specific circumstances of defendant's individual case. (See *In re Sheena K., supra,* 40 Cal.4th at pp. 887-889.)

Disposition

The probation condition requiring defendant to take prescribed medication is modified as follows: "The defendant shall take medication prescribed for treatment of any diagnosed mental disorder if so directed by physician or psychiatrist." As modified, the order granting court probation is affirmed.

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[6] We presume that any medication prescribed would be medically appropriate, that is in the patient's best medical interest in light of the medical condition being treated, the medication's risk of side effects, and its potential effectiveness. (See *Sell v. U.S., supra,* 539 U.S. at p. 181.)

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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DUFFY, J.